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No. 90-1385

In the Supreme Court of the United States

OCTOBER TERM, 1990

FERNANDO W. ANGLADA-ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a border search of a vessel by Puerto Rico police officers who were designated to serve as United States customs officers violated petitioner's Fourth Amendment rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 920 F.2d 77. The pertinent decisions of the district court (Pet. App. 27-38) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1990. The petition for a writ of certiorari was filed on February 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of possessing approximately 63 kilograms

of cocaine with the intent to distribute it, in violation of 46 U.S.C. 1903(a), (c), and (f) (Count 1), and importing that cocaine into the customs territory of the United States, in violation of 21 U.S.C. 952(a) (Count 2). The district court sentenced him to concurrent terms of 211 months' imprisonment on each count, to be followed by a five-year period of supervised release. Gov't C.A. Br. 2.[1] The court of appeals affirmed. Pet. App. 1-26.

1. On November 16, 1988, a team of Puerto Rico police officers headed by Alberto Irizarry Carlo ("Irizarry") were on patrol off the southwestern coast of Puerto Rico aboard the motor launch ZP-7. The team, known as "FURA," the Spanish acronym for "United Forces for Rapid Action," also included Officer Agosto of the Puerto Rico Police Narcotics Division, and Officers Seda, Rondo, Toro, and Torres of the Puerto Rico Police Marine Division. Irizarry, Agosto, and Seda had been designated by the Regional Commissioner of Customs to serve as United States customs officers. As such, they were empowered, when authorized by "the U.S. Customs Service Special Agent-in-Charge or Watch Commander," to board and search vessels suspected of having contraband on board and to conduct customs searches. Pet. App. 3, 39-48; Gov't C.A. Br. 5-6.[2]

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[1] Petitioner's co-defendant, Pedro R. Victoria Peguero, was convicted of the same offenses, and he was sentenced to concurrent terms of 200 months' imprisonment on each count, to be followed by a five-year term of supervised release. Gov't C.A. Br. 2.

[2] In pertinent part, the officers' designation forms identified their duties as cross-designated customs officers as follows (Pet. App. 43, 45, 47):

At about 7:30 p.m., Irizarry received a radio message from the M/V CATU, stating that the vessel was leaving the Dominican Republic en route to Puerto Rico and inquiring about weather conditions on the west coast of Puerto Rico. Irizarry furnished the requested information and identified the ZP-7 as a marine police vessel. He did not, however, provide a specific answer to the CATU's request for the ZP-7's location. Gov't C.A. Br. 7; Pet. App. 3.

Around 9:15 p.m., as the ZP-7 was approaching a buoy off Puerto Real, about one and one-half miles from shore, Irizarry and Agosto saw the CATU and contacted it by radio. The crew of the vessel inquired whether they were heading in the right direction for Puerto Real. The police responded affirmatively, identified themselves, and expressed their intention to come alongside the CATU and check its documenta-

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When authorized by the U.S. Customs Service Special Agent-in-Charge or Watch Commander:

1. Maintaining surveillance, boarding and searching of vessels and aircraft suspected of having contraband drugs on board.
2. Conducting Customs searches and seizing articles smuggled or otherwise illegally introduced into the United States.

In the Memorandum of Understanding between the Puerto Rico Police Department and the Customs Service governing the employment of cross-designated officers, the department agreed, among other things (Pet. App. 40):

> that Customs office designations to employees of The Puerto Rico Police Department will be used only in situations where there has been specific advance approval by the Customs Watch Commander and only to the extent approved by the Customs Watch Commander and for the duration of the specific law enforcement activity for which the approval was gained.

tion. Using a variable range finder, Irizarry determined that the two vessels were then roughly 1.5 miles from shore. Gov't C.A. Br. 7-8; Pet. App. 3-4.

The impossibility of the CATU's travelling from the Dominican Republic to Puerto Rico in the two hours between its radio calls to the ZP-7 aroused Officer Agosto's suspicions. Consequently, after the document check, Agosto called the Puerto Rico Police Department's Narcotics Division to request authorization from the United States Customs Service for a search of the CATU. The request was relayed to the Customs Service office in San Juan, Puerto Rico, which referred the matter to William Jimenez, the supervisor for the Customs Service's air smuggling group and the Service's coordinator for matters related to FURA activities. Jimenez gave permission to board and search the CATU. Gov't C.A. Br. 8-9; Pet. App. 4.

Officers Agosto and Seda boarded and searched the CATU, which was manned by petitioner and three others. Agosto found approximately 65 kilograms of cocaine behind a load of air-conditioner parts in a hard-to-reach below-deck compartment. He informed petitioner and his three companions that they were under arrest. Petitioner was taken to the Customs Service office at Mayaguez, Puerto Rico, where he made a series of highly incriminating statements. Gov't C.A. Br. 10-12; Pet. App. 4-5.

2. In the district court, the defendants moved to suppress the evidence obtained as a result of the seizure and search of the CATU. After a hearing, a United States magistrate recommended that the motions be denied. The district court adopted the magistrate's recommendation, rejecting the defendants' contention that the officers had not received the advance approval for the search required by their des-

ignations. Pet. App. 27-33. The court noted that the record supported the magistrate's conclusion that the officers had obtained the requisite advance approval for the search, but held that 19 U.S.C. 1581(a) made approval unnecessary in any event. Pet. App. 30.

The district court also denied the suppression motion when the defendants renewed it during the trial. The court found it unnecessary to decide whether the search of the CATU had been approved by a Customs Service "watch commander." It held that because the FURA officers who conducted the search acted in the good faith belief that they had been duly authorized to do so, the good faith exception to the exclusionary rule required denial of the motion. Pet. App. 34-36.

3. The court of appeals affirmed. Pet. App. 1-26. The court noted that border searches, including reasonable searches at the functional equivalent of the nation's sea border, are exceptions to the general rule that warrantless searches are unconstitutional, and that such border searches are reasonable "by the single fact that the person or item in question ha[s] entered into our country from outside." *Id.* at 5-6. Although there was some question as to the geographic limits of a valid border search at sea, the court continued, the approach most favorable to the defendants would uphold such a search as long as it occurred within the territorial waters of the United States (those waters within three miles of shore). *Id.* at 7. The court concluded that the district court's finding that the search at issue occurred 1.5 miles from shore, at the functional equivalent of the sea border, was not clearly erroneous. *Id.* at 8.

The court next rejected the contention that 19 U.S.C. 1401(i),[3] which specifies the "customs officers" who are empowered to conduct border searches of vessels, did not permit the FURA officers at issue to serve in that capacity. Pet. App. 8-11. The court noted that Section 1401(i) encompasses not only members of the Customs Service and the Coast Guard, but also any "*other person authorized by law or designated by the Secretary of the Treasury* to perform any duties of an officer of the Customs Service." Pet. App. 8. The court concluded that the FURA officers were eligible, if properly designated, to conduct border searches under the statute. *Id.* at 11. Further, finding that authority to designate customs officers had been delegated to the Regional Commissioner of Customs who appointed the FURA officers at issue here, the court determined that the FURA officers had been duly designated to act in that capacity (*id.* at 12-13).

Finally, the court held that the FURA officers received the advance permission to board and search the CATU that was prescribed by their designations. Although the court acknowledged that the record did not reflect that the Customs Service had denominated any "watch commander" as such on the night of the search, the court interpreted that term, as petitioner's counsel suggested, to refer to "the officer in charge at the time." Pet. App. 14. The court concluded that

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[3] That statute defines "customs officer" in connection with searches conducted pursuant to 19 U.S.C. 1581(a) as:

> [A]ny officer of the United States Customs Service of the Treasury Department * * * or any commissioned, warrant, or petty officer of the Coast Guard, or any agent or other person authorized by law or designated by the Secretary of the Treasury to perform any duties of an officer of the Customs Service.

the FURA officers obtained advance permission for the search from such a "watch commander." *Id.* at 15. The court explained that Agent Jimenez, the Customs Service agent who authorized the search, testified that he was the "'functional equivalent' of the watch commander"; that his actions were "entirely consistent with the idea that [he] was the person in charge at the critical moment"; and that "the absence of evidence that any higher ranking customs official was then on duty" bolstered the conclusion that he was the functional equivalent of the watch commander. *Id.* at 14-15.[4]

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the search of the CATU was illegal because the FURA officers failed to obtain advance approval for the search from a "watch commander."

Under 19 U.S.C. 1401(i) and (j) and 19 U.S.C. 1581(a), "any agent or other person authorized by law or designated by the Secretary of the Treasury to perform any duties of an officer of the Customs Service" may conduct searches of vessels within the "customs waters" of the United States (waters within 12 nautical miles of the shore). See *United States* v. *Thompson*, 475 F.2d 1359, 1362 (5th Cir. 1973) (by series of proper delegations, any person designated by Secretary of Treasury may serve as customs agent).

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[4] The court of appeals also rejected the defendants' challenges to the empanelment of the jury (see Pet. App. 16-21), the jury charge (see *id.* at 21-22), the sufficiency of the evidence (see *id.* at 22-24), the denial of a motion for a continuance (see *id.* at 24-25), and the voluntariness of petitioner's post-arrest statements (*id.* at 25-26). Petitioner does not seek further review of those questions.

Under Treasury Department Order No. 165, Revised, 19 Fed. Reg. 7241 (1954), the United States Commissioner of Customs was empowered to act on behalf of the Secretary of the Treasury. Through Customs Delegation Order No. 48 (T.D. 73-302, Oct. 26, 1973), the Commissioner of Customs delegated to the Regional Commissioners of Customs the authority to designate persons as customs officers. Here, the Regional Commissioner of Customs at Miami, George Heavey, duly designated Officers Irizarry, Agosto, and Seda to serve as customs officers. Gov't C.A. Br. 17. Those designations empowered the officers, "[w]hen authorized by the U.S. Customs Service Special Agent-in-Charge or Watch Commander," to board and search vessels suspected of having contraband on board, to conduct Customs searches, and to seize articles illegally smuggled into the United States. Pet. App. 43-48.

The FURA team intercepted the CATU approximately 1.5 miles from shore, after the CATU had crossed the sea border and entered United States territorial waters. Before searching the vessel, Officer Agosto received specific advance approval for the boarding from Agent Jimenez, who was the functional equivalent of a Customs Service "watch commander" in Puerto Rico on the evening of November 16, 1988. On these facts, the court of appeals correctly determined that the search of the CATU was a lawful search conducted by duly authorized "customs officers" (19 U.S.C. 1401(i), 1581) at the functional equivalent of the nation's sea border. Pet. App. 14-15.

Searches of persons and vehicles crossing the borders of the United States "are reasonable simply by virtue of the fact that they occur at the border."

United States v. *Ramsey*, 431 U.S. 606, 616 (1977); see also *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537-540 (1985). Such searches

> are universally thought to be legitimate; [they] protect an important national interest—the prevention of smuggling; smuggling activities would be almost impossible to detect without [these] searches; people crossing into a nation's territorial waters know they are likely to be searched; and vessels are searched only because they belong to a morally neutral class.

United States v. *Williams*, 617 F.2d 1063, 1085 (5th Cir. 1980). Accordingly, when a vessel crosses into the customs waters of the United States, customs officers may board it without permission to conduct a safety and document search and may gain access to all common areas of the vessel, including the open deck, cargo holds, engine rooms, and ice holds. *United States* v. *Lopez*, 761 F.2d 632, 635 (11th Cir. 1985). In addition, customs officers have the authority to stop and search a vessel at the functional equivalent of a border, without suspicion of criminal activity, where it is reasonably probable that the vessel has crossed the border. *United States* v. *Helms*, 703 F.2d 759, 763 (4th Cir. 1983).[5]

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[5] There is no conflict between the court of appeals' decision and either *United States* v. *Sandoval Vargas*, 854 F.2d 1132, 1136 (9th Cir. 1988), or *United States* v. *Soto-Soto*, 598 F.2d 545, 550 (9th Cir. 1979). Both of those cases stand for the proposition that a search conducted without participation by or coordination with customs officers is not a border search within the meaning of the customs laws. In the present case, the border search was approved by Customs Service agent Jimenez and was conducted by properly cross-designated customs officers Agosto and Seda.

In the final analysis, petitioner challenges only the determination that the Customs Service agent who authorized the search, Agent Jimenez, was a "watch commander" within the meaning of the documents designating three members of the FURA team to serve as customs officers. The interpretation of those materials and their application to the particular facts of this case present no question calling for this Court's review. Moreover, the record requires rejection of petitioner's contention. Agent Jimenez testified that he was the " 'functional equivalent' of the watch commander," his actions were entirely consistent with that characterization, and the record did not reflect that any higher ranking Customs Service official was then on duty.

2. The petition presents two additional questions not decided by the court of appeals. Petitioner contends: (1) that *United States* v. *Caceres*, 440 U.S. 741 (1979), would not render the exclusionary rule inapplicable to any deviation from the procedure required by the cross-designation documents (Pet. 10-14); and (2) that the "good faith" exception to the exclusionary rule (see *United States* v. *Leon*, 468 U.S. 897 (1984)) is inapplicable (see Pet. 14-16). The court of appeals found it unnecessary to reach those questions (Pet. App. 15 n.4; see Pet. 11, 14), and this Court does not ordinarily consider questions not specifically passed upon by the court below. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).

In any event, petitioner's contentions are without merit. The district court correctly applied *United States* v. *Caceres*, 440 U.S. at 755-757, when it ruled that an administrative violation, if one in fact oc-

curred, does not trigger application of the exclusionary rule. Similarly, because the officers boarded and searched the CATU in the good faith belief that they had been validly authorized to do so by Agent Jimenez, the district court was also correct in ruling that the "good faith" exception to the exclusionary rule, *United States* v. *Leon*, 468 U.S. at 909, barred suppression of the evidence. See also *Illinois* v. *Krull*, 480 U.S. 340 (1987); *United States* v. *Williams*, 622 F.2d 830, 840-843 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(1) U.S. GOVERNMENT PRINTING OFFICE: 1991 [illegible]